

COVID-19 Impact on Businesses, Insurers, and the Economy
Why is a Federal Solution is Necessary?

Potential Impact of State Legislation

In response to the current crisis, many states are issuing executive orders or considering legislation that will grant, via statutory presumption, workers' compensation coverage to workers contracting COVID-19, without proof that the disease was contracted *via* exposure in the workplace or that the disease is particular to the type of industry where the employee works. The scope of these new presumptions varies in the states. Some states have provided the presumption only to first responders and/or front-line health care workers, while others extend the presumption to all "essential" workers or even to all workers.

While we fully appreciate the valuable work being performed by first responders, health care workers and other workers during this crisis, these new laws and executive orders pose a severe threat to our industry. These laws create entirely new payment obligations that were never contemplated for payment under the workers' compensation law and for which premium was never collected and do so after the crisis has unfolded.

The new retroactive presumption laws and executive orders pose a severe threat to an already fragile business community by creating new payment obligations that were never contemplated as being covered under the workers' compensation law. Not-for-profit organizations and local governments are also grappling with these new liabilities and potential costs. Mandating new coverages creates additional burdens and costs for all who are already struggling to stay open, reopen, and maintain their workforce.

A cost analysis performed by the New York Compensation Insurance Rating Board of a New York presumption proposal that would create a presumption of coverage for all workers contracting COVID-19, demonstrated that the retroactive coverage expansion would impose in excess of \$31 billion in new costs for the New York workers' compensation system and business community. By comparison, New York had \$8.7 billion in total workers' compensation claim losses in all of 2019.

Similarly, the Workers' Compensation Insurance Rating Bureau of California ("WCIRB") has estimated that a California proposal creating a statutory presumption for all critical employees could impose additional workers compensation costs of \$33.6 billion, more than doubling the costs of all workers compensation losses for all other causes for the entire year. The National Council on Compensation Insurance ("NCCI") has estimated that the potential annual cost of adoption of statutory presumptions covering all workers in the 38 states where NCCI is the

rating organization could be as high as \$81.5 billion. By comparison, NCCI estimates that the annual losses for all other non-COVID-19 workers' compensation claims in those states for the entire year will be \$32 billion.

Reopening Challenges

As our nation and individual states move forward and reopen businesses and our economy there will be significant challenges for businesses, besides whether their customers, employees, and suppliers will return.

APCIA is proactively supporting issuance of guidance to businesses to safely reopen along with liability protections to ensure that businesses trying to follow applicable guidelines are not shut down by abusive lawsuits, including businesses that provided unusual help such as manufacturing emergency supplies or housing emergency workers during the current crisis.

Efforts to Comport with Government Standard: Many businesses will be looking to the government for guidance on the steps to properly clean, restore, open, and maintain their operations, as well as maintain the safety of their employees and customers. There has been extensive guidance issued at the federal, state, and local levels for cleaning and sanitizing facilities to reduce the chances of COVID-19 contamination. Unfortunately, the guidance is complex, and the significant lack of uniformity increases the challenges and creates a roadblock for reopening businesses. Even for businesses that try to follow the plethora of government guidance, the risk of continuing COVID-19 transmission will continue, and companies will face liability based on a simple negligence standard despite the extraordinary circumstances and lack of clarity in guidance.

Efforts to Reduce Liability and Encourage Restarting Operations: The potential for a second COVID-19 crisis of liability litigation against the private sector is real and will dampen efforts to restart the economy. To avoid this, APCIA has sought simple protections for the good faith efforts of impacted sectors following accepted guidance. In doing the right things, such actors would not then be exposed based on simple negligence in an unprecedented national disaster.

APCIA has drafted a declaration to form the basis of executive action or legislation in the states. The declaration would provide civil protections for the following highly impacted sectors acting as part of the COVID-19 response: (1) medical providers; (2) health care and senior residential facilities; (3) owners, occupants, or managers of properties; (4) transportation owners, drivers, or contractors; (5) construction companies, contractors, subcontractors, or trades; and (6) manufacturers, distributors, restaurants, or retailers, including grocers.

The draft also offers civil protections for various sectors reopening properties that make good faith efforts to follow government guidance. Those protections would extend to: (1) schools, universities, state and local governments, and private sector or non-profit property owners,

occupants, or managers, and (2) individuals, contractors, and their employers that clean, disinfect, remediate, or otherwise prepare any property of any kind to be returned to use.

Importantly, the protection provided is limited. It does not extend to acts or omissions that constitute a crime, actual fraud, actual malice, or willful misconduct. The fear of liability and litigation are real as more than 1,000 COVID-19 lawsuits have already been filed. If reasonable steps are taken to reduce liability litigation, it will enhance the recovery we seek.

What about the Future? Is a Federal Solution the Answer? Is it Necessary?

Should states seek to separately address virus-related business continuity issues, it is likely that the most exposed states with the densest urban populations would be at the highest risk and thus pay the most for viral outbreak coverage. State programs would be unlikely to have access to enough funding to subsidize the billions of dollars necessary (for the larger states) to provide coverage. Insurers likely would be unwilling or unable to participate in programs that would force uninsurable risks onto their balance sheets. And most businesses that were impaired in the current crisis will not be able or willing anytime soon to make very significant additional payments even for partly subsidized coverage. The federal Coronavirus Aid, Relief, and Economic Security (CARES) Act is expected to cost at least \$1.8 trillion in assistance. States simply do not have the financial resources, and – even when combined with the financial assets of insurers doing business in the state – cannot come close to responding to the magnitude of the closure losses. Even if states set up public risk facilities for viral exposures, they would not have the capacity to spread the risk beyond their state’s borders, even with post-event financing, based on the sizes of losses in the current viral pandemic.

Several states have looked at or are considering legislative proposals that would apply to small businesses, which either retroactively mandate BI coverage for business losses from COVID-19-related closures or prospectively require that such losses be covered. Retroactive coverage would most likely end up in lengthy and expensive litigation that would not benefit any parties but could significantly destabilize individual commercial insurers and impact availability. Prospective requirements to provide viral coverage would likely be expensive and many businesses currently do not purchase business interruption coverage due to the cost.

What about future pandemics?

The APCIA, NAMIC and the IIABA (Big I) has developed the Business Continuation Protection Program (BCPP) the contours of which are based on a parametric trigger to provide immediate relief to businesses shut down by the government in the next pandemic.

The policy groups examined different potential approaches to operationalizing principles and essential elements developed and adopted, not only by the APCIA Board, but by NAMIC and the IIABA (Big I).

Essential Elements:

- No retention of any viral, bacterial, communicable disease or “pandemic” risk on the insurers’ (or other servicing entities’ balance sheets)
- Program should only cover ongoing necessary payroll and expenses
 - *Not lost profits (which would be too expensive and politically less palatable)*
 - *Pay a portion of the loss – but probably not all as too expensive for business*
 - *Pay for partial shutdowns as well as complete following a federal disaster or emergency declaration.*
 - *Would apply to the whole country or specific states as determined by the federal government*
- The program needs to be kept simple and separate from underlying business interruption coverage
 - *Otherwise there will be coverage conflicts causing litigation*
- Eligibility for payments needs to be easily verifiable and designed to minimize fraud
 - *Business interruption insurance is extremely complex and requires extensive forensic accounting, which would create untenable delays and expenses for a widespread federal program*
- Program triggers should be simple, transparent, and designed to avoid politicization
 - *Coverage could be tied to a national declaration of a “pandemic” along with stoppages and lockdowns*
- Payments should be designed to incentivize business to operate at as much capacity as possible and to resume operations as quickly as possible after a shutdown or modified operations due to federal orders
 - *Avoid creating incentives for businesses to shut down entirely or delay getting back to work, although some business sectors will need some ramp-up time*
- Financial entity participation should be voluntary
- The White House/Congressional goals are focused on providing sufficient aid to businesses in a “pandemic” necessary to keep their workers employed
- Some in Congress want privately set rates; however:
 - *Under the Crop program and the National Flood Insurance Program, the rates, forms, limits, etc. are set by the Federal Government and that has specific advantages, particularly since we know that:*
 - *Rates would need to reflect the very low frequency and high severity*
 - *Consideration needs to be given to affordability and how to require or encourage take-up rates*
 - *Rates need to include contractor administrative, underwriting and capital costs*

Conclusion

Viral outbreaks are an uninsurable risk. Therefore, the only real answer to the question of providing such protection for American businesses from such risks requires a federal government solution.

Sincerely,

Joe Woods
Vice President-State Government Relations
American Property Casualty Insurance Association
Joe.woods@apci.org
O: 512-358-1345
M: 512-413-6638

Lee Ann Alexander
Vice President-State Government Relations
American Property Casualty Insurance Association
Leeann.alexander@apci.org
O: 512-557-5916